No. 82-1754

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

IN THE MATTER OF THE
ARBITRATION BETWEEN MARITIME
INTERNATIONAL NOMINEES ESTABLISHMENT,
Petitioner,

v.

THE REPUBLIC OF GUINEA,
Respondents,

UNITED STATES OF AMERICA,
Intervenor.

PETITIONER'S REPLY BRIEF

Julius Kaplan,
Counsel of Record

KAPLAN RUSSIN & VECCHI
1218 16th Street, N.W.
Washington, D.C. 20036
(202) 638-0060
Attorneys for the Petitioner

Of Counsel:

James W. Schroeder
Robert L. Bard

August 8, 1983

THE CASILLAS PRESS, INC. — 1717 K Street N.W. — Washington, D.C. — 223-1220

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases — Page

Statutes:

Miscellaneous:

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

No. 82-1754

IN THE MATTER OF THE
ARBITRATION BETWEEN MARITIME
INTERNATIONAL NOMINEES ESTABLISHMENT,
Petitioner,

v.

THE REPUBLIC OF GUINEA,
Respondents,

UNITED STATES OF AMERICA,
Intervenor.

PETITIONER'S REPLY BRIEF

Petitioner respectfully submits this reply to the briefs in opposition filed by the Republic of Guinea and by the United States.

ARGUMENT

1. In opposing the petition for certiorari, the United States and Guinea take positions which run directly counter to this Court's tendency to limit litigation by expanding the scope of collateral estoppel and *res judicata*. *See, e.g.*, Note, *Res Judicata/Collateral Estoppel Effect of a Court Determination in a Subsequent Action*, 45 Alb. L. Rev. 1029 (1981); Comment, *The Expanding Scope of the Res Judicata Bar*, 54 Tex. L. Rev. 527 (1976). Both opposing

parties take the narrowest possible view of the estoppel effect of default judgments.

Only last Term, this Court unequivocally reiterated the long standing rule that a defaulting party that has had the opportunity to challenge subject matter jurisdiction is estopped from relitigating that issue in another proceeding between the same parties. *Insurance Corp. v. Compagnie des Bauxites,* 456 U.S. 694, 700 n. 8 (1982). Guinea and the United States argue that *Compagnie des Bauxites* is inapposite since it only applies where both actions are based on the same claim. According to the respondents, if the second proceeding is based on a "different claim," all issues decided in the prior default proceeding, including subject matter jurisdiction, are subject to collateral attack. (Guinea Br. 7; United States Br. 6). They argue further that an action to confirm an arbitral award constitutes a "different claim" from that asserted in the prior proceeding to compel arbitration. (Guinea Br. 7; United States Br. 5-6).

Actions to compel arbitration and to confirm an arbitral award are *not* two "different claims." They are merely two procedural steps in the assertion of a single underlying cause of action. *Marchant* v. *Mead-Morrison Co.,* 29 F.2d 40, 43 (2d Cir. 1928)[1]; *Krauss Bros. Lumber Co.* v. *Louis Bossert & Sons, Inc.,* 62 F.2d 1004, 1005 (2d Cir. 1933). Accordingly, in *Marine Transit Corporation* v. *Dreyfus,*

---

[1]Although the *Marchant* case dealt with the New York Arbitration Act, given the similarity between the New York and Federal Acts, New York cases are deemed authoritative in the absence of applicable Federal cases. *Amicizia Societa Navegazione* v. *Chilean Nitrate and Iodine Sales Corp.,* 184 F.Supp. 116, 117 (S.D.N.Y. 1959).

294 U.S. 263, 275-76 (1932), this Court stated that "where the court has authority under the [Federal Arbitration Act] . . . to make an order for arbitration, the court also has authority to confirm the award."

A proceeding to confirm an aribtral award is thus analogous to a proceeding to register a judgment in a different jurisdiction. In the latter case, the judgment debtor cannot relitigate issues that were litigated, or could have been litigated – including subject matter jurisdiction – in the prior proceeding. *See, e.g., Hatridge* v. *Aetna Casualty Surety Co.*, 415 F.2d 809 (8th Cir. 1969); *Indemnity Ins. Co. of North America* v. *Smoot*, 152 F.2d 667 (D.C. Cir. 1945); *Restatement (Second) of Judgments* § 18 (1982).

2. Even assuming, *arguendo*, that "different claims" were asserted in the two connected proceedings, it does not follow, as Guinea and the United States contend, that a default judgment never has collateral estoppel effect.[2] Unfortunately, guidance from this Court on this issue is scant

---

[2]Even if collateral estoppel did not generally apply to issues pertaining to the subject matter of a default judgment, which we deny, it should be made applicable to the present case. Unlike the issues involved in every prior federal decision on this point, this case involves a determination of subject matter jurisdiction, which must always be determined by a federal court. Section 1608(e) of the FSIA requires that before a default judgment is rendered against a foreign sovereign, the claimant must establish a claim or right to relief "by evidence satisfactory to the court." Since subject matter jurisdiction is a crucial component of any claim, a court that issues a default judgment against a sovereign necessarily must have determined that it had subject matter jurisdiction to render that judgment. In this case, subject matter jurisdiction was pleaded by MINE and the district court found that MINE had established a claim for relief pursuant to that statute.

and somewhat contradictory;[3] federal circuit courts' decisions are in conflict,[4] as are the writings of legal

[3]In *Last Chance Mining Co.* v. *Taylor Mining Co.*, 157 U.S. 683, 691 (1895), the Court ruled that "a judgment by default is just as conclusive an adjudication between the parties of whatever is essential to support the judgment as one rendered after answer and contest." The Court has suggested at least two, or possibly three, different standards for determining the collateral estoppel effect of a judgment with respect to a second proceeding placed on a different claim. According to the most recent decision, *Nevada* v. *United States*, 51 U.S.L.W 4974, 4979 n. 11 (June 24, 1983), collateral estoppel can be used only to prevent "relitigation of issues actually litigated" in a prior lawsuit. Two years earlier, however, in *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980), this Court had suggested a different test: "Under collateral estoppel, once a court has *decided* an issue of fact or law necessary to achieve a judgment, that decision may preclude litigation of the issue in a suit on a different cause of action . . . " . (Emphasis added.) A similar test was employed in *Montana* v. *United States*, 440 U.S. 149, 153 (1979). Yet a month earlier, in *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n. 5 (1979), the Court seemingly relied on the "actually litigated" test.

Clearly, the outcome of a particular case will vary depending on which test is used. A plaintiff is always required to state the basis for the court's subject mater jurisdiction in his pleadings, and the court must necessarily rule on the issue before proceeding to judgment — even a default judgment. Thus, the findings required in a default judgment rendered by a federal court would seem to satisfy a "necessarily determined" or "necessarily decided" criterion, but presumably fail to satisfy a "necessarily litigated" standard.

[4]The First Circuit held in *United States* v. *DeVincent*, 632 F.2d 147, 154 (1980) that "collateral estoppel only bars relitigation of an issue of ultimate fact which was actually *or* necessarily determined by the former judgment . . ." . (Emphasis added). Also favoring the use of collateral estoppel in the case of "necessarily determined" issues that were not litigated are the Fifth, Eighth and D.C. Circuits, and the Court of Customs and Patent Appeals. *Peckham* v. *Family Loan Co.*, 196 F.2d 838 (5th Cir. 1952); *Brown* v. *Kenron Alum. & Glass Corp.* 477 F.2d 526 (8th Cir. 1973); *Woods* v. *Cannaday*, 158 F.2d 184 (D.C. Cir. 1946); and *Williams* v. *Five Platters*, 510 F.2d 963 (C.C.P.A. 1975).

Circuits which have reached contrary decisions include the D.C. Circuit and the 3d Circuit: *Konstantinidis* v. *Chen*, 626 F.2d 933 (D.C.

scholars.[5] Those cases which tend to limit the application of collateral estoppel to issues that were actually litigated generally involve situations in which relitigation of those issues does not undermine the integrity and value of the judgment itself,[6] as would happen in the present case. Here, if the court of appeals' decision to open the issue of subject matter jurisdiction to collateral attack is left intact, the order to compel arbitration and the subsequent arbitral award become valueless in a federal court.

3. In general, whenever Congress confers new subject matter jurisdiction on federal courts, the requirements for subject matter and personal jurisdiction are entirely independent of each other. However, under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), and only under that Act, subject matter and personal jurisdiction are comingled. The elimination of traditional distinctions between subject matter and personal jurisdiction blurs the general principles of *res judicata* and collateral estoppel as they apply to each kind of jurisdictional issue. If subject matter jurisdiction cannot be collaterally attacked where one

---

Cir. 1980), *Tutt* v. *Doby*, 459 F.2d 1195 (D.C. Cir. 1972) and *Matter of McMillan*, 579 F.2d 289 (3d Cir. 1978).

[5] *Compare, e.g.*, 1B Moore, *Moore's Federal Practice* ¶0.444[2] (2d ed. 1983), Restatement (Second) of Judgments § 27 (1982), and Hazard, *Revisiting the Second Restatement*, 66 Cornell L.Rev. 564, 574-586 (1981) *with* 2 Freeman, *A Treatise on the Law of Judgments* § 662 (5th ed. 1925) and Vestal, *The Restatement (Second) of Judgments, Modest Dissent*, 66 Cornell L.Rev. 464, 483-488 (1981).

[6] *See, e.g.*, *Tutt* v. *Doby*, *supra*, 459 F.2d 1195 (permitting relitigation of issue of *amount* of rent due where prior action was concerned largely with whether or not landlord was entitled to possession of premises for nonpayment of rent); *Konstantinidis* v. *Chen*, *supra*, 626 F.2d 933 (permitting plaintiff, who had received workers' compensation settlement for damages allegedly arising from work-related accident, to sue his doctor for essentially the same damages on claim of negligent acupuncture treatment.)

has had an opportunity to litigate the issue, but personal jurisdiction can be collaterally attacked under some circumstances, as the court of appeals suggests, what happens when the same facts and legal conclusions apply to both forms of jurisdiction under the FSIA? We suggest that this issue alone requires review and clarification by this Court.

4. Guinea and the United States also question MINE's right to petition this Court for review of the court of appeals' ruling on collateral estoppel because MINE allegedly did not raise this issue in a timely fashion below.[7] Whether or not this is so, the court of appeals itself raised and ruled upon the issue of collateral estoppel in its original opinion, and reaffirmed its ruling in its revised opinion. These rulings are holdings of the court – not dicta. They will serve as precedent in this important, but unchartered, area of federal law unless this Court decides otherwise.

It cannot be seriously contended that if this Court disagrees with the court of appeals' interpretation of the federal doctrine of collateral estoppel, it may not correct it. Yet this is precisely what Guinea and the United States suggest. Neither the United States nor Guinea cite any authority supporting their contention that this Court may never review an issue raised *sua sponte* by a lower court. Although this court is of course not required to review such an issue, it certainly can if it so wishes. *See, e.g., Blair* v. *Oesterstein Machine Co.*, 275 U.S. 221, 225 (1927);

---

[7]Petitioner has always contended that it did in effect raise this issue in a timely fashion prior to its petition for rehearing in the court of appeals. In its opening brief in the court of appeals dated November 2, 1981, at 20-22, MINE argued that the district court's order to compel arbitration was *res judicata* and could not be collaterally estopped. Guinea thus had ample opportunity to address the issue of collateral estoppel below.

Illinois v. Gates, No. 81-430, *slip op.* at 2-9 (June 8, 1983); *see also, Verlinden B.V. v. Central Bank of Nigeria*, No. 81-920, *slip op.* at 4-5 (May 23, 1983).

CONCLUSION

This case – a case which already has been the subject of considerable scholarly writings –[8] raises several important, difficult, and recurring issues of federal jurisdiction and the federal doctrine of *res judicata* and collateral estoppel. One of these issues – the effect of the merger of personal and subject matter jurisdiction in the FSIA – is one of first impression. One other – the collateral estoppel effect of an issue decided in a default judgment case – is the subject of conflicting statements by this Court, holdings by the circuit courts and opinions of legal scholars. These issues, we submit, require review and

---

[8] *See, e.g.*, Comment, *Effect on U.S. Jurisdiction of Agreement by a Foreign Sovereign to Arbitrate before the International Center for the Settlement of Investment Disputes, Maritime International Nominees Establishment v. Republic of Guinea*, 16 Geo. Wash. U.J. Int'l L. & Econ. 451 (1982); Comment, *Sovereign Immunity – arbitration – agreement to arbitrate not contemplating role for U.S. courts held not to waive immunity, Maritime International Nominees Establishment v. Republic of Guinea*, 77 Am. J. Int'l L. 318 (1983); Dellapenna, *Suing Foreign Governments and Their Corporations; Choice of Law, Part VII*, 87 Com. L.J. 244 (1982); Kahale, *Arbitration and Choice of Law Clauses as Waivers of Jurisdictional Immunity*, 14 N.Y.J. Int'l L. & Pol. 29 (1981); Comment, *Problems "Arising Under" Verlinden, B.V. v. Central Bank of Nigeria*, 31 Am. U.L. Rev. 1039 (1982); Note, *Subject Matter Jurisdiction and the Foreign Sovereign Immunities Act of 1976*, 68 Va. L. Rev. 893 (1982).

clarification by this Court. For these reasons, the writ of certiorari should be granted.

Julius Kaplan,
Counsel of Record.

KAPLAN RUSSIN & VECCHI
1218 16th St., N.W.
Washington, D.C. 20036
(202) 638-0060

Attorneys for the Petitioner

Of Counsel:
James W. Schroeder
Robert L. Bard

August 8, 1983.